(1) No. 96 890 NOV 26 1996

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In The

Supreme Court of the United States

October Term, 1996

BETTY-LOUISE FELTON, *et al.*,

Cross-Petitioners,

vs.

RACHEL AGOSTINI, *et al.*,

Cross-Respondents,

-and-

CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, *et al.*,

Cross-Respondents.

Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Should this Court countenance the procedure approved by the courts below in which the cross-respondents have invoked Rule 60(b) of the Federal Rules of Civil Procedure in order to obtain a rehearing of an appeal to this Court in this case, eleven years after the original hearing and essentially on the basis of the original record on appeal, because of comments in the opinions of Justices of this Court in a case in which the prior determination of the Court in this case was not at issue?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings in the United States Court of Appeals for the Second Circuit were the following:

Betty-Louise Felton, Charlotte Green, Barbara Hruska, Meryl A. Schwatz, Robert H. Side and Allen H. Zelon, plaintiffs-appellees-cross-appellants;

Chancellor of the Board of Education of the City of New York and the Board of Education of the City School District of the City of New York, defendants-appellants-cross-appellees;

Rachel Agostini, Maria Cosarca, Digna Duran, Ivette Encarnacion, Maria L. Fernandez, Dolly Cutrera Then, Joseph M. Then, Margaret Figueroa, Michele Gallo, Marie Sejour, Joan Jackson. Cheryl Malcousu, Tonya Stevens and Rosemarie Vasques, defendants-intervenors-appellants-cross-appellees;

Secretary, United States Department of Education, defendant. (The Secretary did not appeal to the Court of Appeals, having declined to join in the motions of the other defendants and the defendants-intervenors in the District Court).

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Cross-petitioners, Betty-Louise Felton, *et al.*, respectfully petition this Court for a writ of certiorari to review that part of the summary order in this action of the United States Court of Appeals for the Second Circuit which held that petitioners properly invoked Rule 60(b)(5) of the Federal Rules of Civil Procedure to obtain a rehearing of the final determination of this Court in *Aguilar v. Felton*, 473 U.S. 402 (1985).

OPINIONS AND ORDERS BELOW

The memorandum and order of the District Court for the Eastern District of New York is unreported and is reproduced at A1 *et seq.*[1] The summary order of the Court of Appeals for the Second Circuit is unreported and is reproduced at A5 *et seq.*

STATEMENT OF JURISDICTION

The summary order of the Court of Appeals for the Second Circuit was entered on August 30, 1996. This Court has jurisdiction to review that order pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

United States Constitution, Amendment 1:

> Congress shall make no law respecting an establishment of religion. . . .

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1. Unless otherwise indicated, all references in this cross-petition to "A" followed by a number or numbers are intended to refer to a page or pages in the appendix to the petition of cross-respondents Chancellor and Board of Education of the City of New York.

Federal Rules of Civil Procedure, Rule 60(b)(5)

Rule 60. Relief from Judgment or Order

* * *

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons: . . . (5) the judgment has been satisfied, released or discharged, or a prior judgment on which it is based has been reversed or vacated, or it is no longer equitable that the judgment should have prospective application; . . . .

STATEMENT OF THE CASE

In 1985, in this case, under the name of *Aguilar v. Felton*, 473 U.S. 402 (1985), this Court held that it was impermissible under the Establishment Clause of the First Amendment to the Constitution for government agencies to use public funds, under the federal statute popularly called "Title I," to finance a program or plan in which publicly-employed and paid teachers and counselors provided remedial instruction and counseling on the premises of schools whose primary, if not only, reason for existence was their religious mission — in this instance, mainly the Roman Catholic parochial schools in the City of New York.

Pursuant to the mandate of this Court and thereafter the order of the Court of Appeals for the Second Circuit, the District Court for the Eastern District of New York, in which this case originated, gave the government agencies that were involved in

the case, principally the Board of Education (which was not originally a party, but was involved through the Chancellor who was an original party) one year within which to develop an alternative program or plan to that invalidated in *Aguilar* to provide Title I services to students attending religious[2] schools in New York City off the premises of those schools. *Felton v. Secretary, United States Dept. of Education*, 78 Civ. 1750 (ERN) (E.D.N.Y. 1985), *aff'd*, 787 F.2d 35 (2d Cir. 1986).

The plan that the Board of Education thereupon developed for use commencing with the school year 1986-87 (called by all concerned the "Alternative Plan") initially provided for Title I services for religious school students to be performed mainly on the premises of "matching" public schools within a ten-minute walk or bus ride from the religious school students' home schools. That initial Alternative Plan was flatly rejected by the vast majority of the principals of the religious schools (A123-A124). The Alternative Plan that was thereafter developed and has been in operation in New York City for a decade relies primarily on providing Title I services to students of participating religious schools in mobile instructional units ("MIUs"), equipped as classrooms, which drive up to, or close by, the doors of the religious schools (A57, A99, A128).

The Board of Education leases the MIUs at the rate of slightly more than $106,000 per year per unit, including driver service and maintenance (but excluding the administrative cost attendant upon scheduling and otherwise using the units) (A87), and the Board has somewhat less than 130 units under lease (A158).

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2. Cross-petitioners use the term "religious" schools as the most apt, brief description of schools whose primary, if not only, reason for existence is their religious mission.

Taxpayers affiliated with the cross-petitioners in this case commenced an action in the District Court for the Eastern District of New York, *Committee for Public Education and Religious Liberty v. Secretary, United States Department of Education*, 88 Civ. 96 (JG) (E.D.N.Y.) (hereinafter referred to as the "*PEARL* case"), for a declaratory judgment that the Alternative Plan is constitutionally impermissible and for an injunction restraining its continuance. In that case, however, which was ultimately assigned to the same District Judge who decided the Rule 60(b)(5) motions in this case, the District Judge has recently granted a motion for summary judgment made by the defendants, who include the cross-respondents in this case, dismissing the plaintiffs' action.

Despite that part of the cost of the Alternative Plan in excess of the original Title I plan in operation in New York City prior to *Aguilar*, and the administrative difficulties allegedly attendant upon providing Title I services under the Alternative Plan (in MIUs outside of the main doors of the participating religious schools instead of in "Title I" classrooms on the other side of those doors), at no time during the nine years preceding the Rule 60(b)(5) motions in this case did cross-respondents take any step to seek "relief" from the determination in *Aguilar*. It is beyond dispute that what prompted them to make their Rule 60(b)(5) motions, and what persuaded the District Court and the Court of Appeals to decide that such motions were "procedurally firm" (A20), were the comments in opinions of Justices of this Court in *Board of Kryas Joel Village School District v. Grumet*, 114 S. Ct. 2481 (1994), that were unfavorable to the determination of the Court in *Aguilar* (A5, A16, A18, A20-A21).

Notwithstanding the aforementioned comments, and indeed because they emphasized the fact that this Court has not heretofore overruled *Aguilar*, the courts below acknowledged

that they lacked the power to do so, and they denied cross-respondents' Rule 60(b)(5) motions for that reason (A5, A20). The District Court acknowledged even more:

> As noted below, it is possible to make too much of the *Aguilar*-bashing mentioned above. The various comments about the decision in *Kryas Joel* were made or joined in without the benefit of briefing and oral argument, and three of the five Justices involved were not on the Court when it decided *Aguilar.*

(A16, footnote).

* * *

> There may be good reason to conclude that *Aguilar*'s demise is imminent, but it has not yet occurred. More importantly, *it is not so certain an event that this Court could properly anticipate it by affording the relief sought herein.*"

(A20; cross-petitioners' italics).

It is also worth noting that the lead defendant in this case, the Secretary, United States Department of Education, did not join in the motions below for the reason that they were denied — *i.e.*, because, as the Secretary's attorneys in the Justice Department advised their client and the District Court, it was, in their opinion, beyond the power of any lower court to overrule a determination of this Court (A12, A103).[3]

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3. It also bears noting that, in their petitions for a writ of certiorari,

(Cont'd)

The present status of this case, therefore, is that there is an outstanding order of the Court of Appeals affirming an, order of the District Court which denied cross-respondents' Rule 60(b)(5) motions while ruling that those motions were "procedurally firm" (A5, A20). Cross-respondents appealed to the Court of Appeals from that part of the District Court's order that denied their motions. Cross-petitioners cross-appealed to the Court of Appeals from that part of the lower court's order that ruled the motions to be "procedurally firm." Because the Court of Appeals affirmed the District Court's order "substantially for the reasons stated therein" (A5), it seems clear that the Court of Appeals effectively denied both appeals.

REASONS FOR GRANTING THE WRIT

Preliminary Statement

Cross-petitioners respectfully emphasize that we file our cross-petition to preserve our position maintained in the courts below, but rejected by those courts, that the Rule 60(b)(5) motions pursuant to which cross-respondents sought relief below, and presumably continue to seek relief in this Court, were not, and are not, "procedurally firm." We do not, therefore, seek a writ of certiorari, as do cross-respondents, for a rehearing of this Court's prior determination in *Aguilar.* We seek a writ, pursuant to this Court's Rule 10(a), because the procedure followed by cross-respondents in this case has so far departed from the accepted and usual course of judicial proceedings as to cause this Court to renounce such procedure as an exercise of the Court's supervisory power.

(Cont'd)
cross-respondents are in the anamolous position of parties seeking to appeal to this Court from the indisputably correct decisions of the courts below holding that those courts may not properly issue any order that countermands, or has the effect of countermanding, a determination of this Court.

We respectfully submit that the procedure in question is a monstrosity that has not the slightest basis in the plain language of the Rule 60(b)(5) invoked by petitioners, the case law interpreting that Rule, the procedure followed by this Court in reconsidering a prior decision of the Court, or basic principles of common law as well as constitutional law to which this Court has consistently adhered throughout its history.

Additionally, we respectfully submit, the procedure in question, if countenanced by this Court, will create a precedent that will unnecessarily burden this Court and lower courts with motions under Rule 60(b)(5) in future cases that are as equally unwarranted as those brought by cross-respondents in this case.

Lastly, but most importantly, the procedure in question, if countenanced by this Court, and if cross-respondents' petitions are granted, will bring on for reconsideration by this Court its prior determination in *Aguilar* on the basis of a record that is inadequate and out-of-date, relating to a program or plan that was developed under a statute now significantly modified, and that even cross-respondents have more than indicated they do not, if successful in this Court, intend to re-institute without significant changes.

I.

THE PROCEDURE APPROVED BY THE COURTS BELOW HAS NO BASIS IN THE PLAIN AND UNAMBIGUOUS LANGUAGE OF RULE 60(b)(5).

Rule 60(b)(5) provides that "a court may relieve a party . . . from a final judgment [if] the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective

application." It is clear that the Rule does not apply to the present case in that the determination of this Court in *Aguilar* has not been "satisfied, released, or discharged, or a prior judgment on which it is based has been reversed or otherwise vacated." As noted above, the comments in the opinions of Justices of this Court in *Kiryas Joel,* indicating a desire at some future time not yet reached, to reconsider and/or overrule *Aguilar*, establish that fact beyond reasonable doubt.

It is respectfully submitted that it is equally clear, at least in this case, that, whatever position is taken or held on the merits of *Aguilar,* the governing principles or considerations are not "equitable" in nature. They are constitutional, as set forth in our fundamental law, which may or may not be equated with principle or rules of equity.

Thus, the claims of the cross-respondents to the effect that the determination of this Court in *Aguilar* has, allegedly, greatly increased the financial cost of Chapter I (formerly and now once again "Title I") services to the students of participating religious schools in New York City, and has, allegedly, greatly reduced the effectiveness of the Board of Education in providing those services, even if true, provide no basis for relief under Rule 60(b)(5). If an act or program is prohibited by the Constitution, a claim that the prohibition is costly or inefficient is unavailing. As Judge Friendly, speaking on behalf of a unanimous Court of Appeals when this case first came before that Court, noted:

> While other ways [than on premises services] of using Title I funds for the benefit of students in religious schools can be found, these, as shown in *Wolman,* are almost certain to be less effective, more, costly, or both.

* * *

> However, efficiency was not the objective of the framers of the bill of rights; they aimed to restrain government from certain acts which legislative authorities had determined to be wise. *See Stanley v. Illinois*, 405 U.S. 645, 656 (1972) ("But the Constitution recognizes higher values than speed and efficiency."). 739 F.2d at 7172.

If the rule were otherwise, if cost and efficiency could outweigh a command of the Constitution, it is respectfully submitted that there would be a solid basis for abolishing the right to trial by jury, which is surely much more costly and much less effective administratively than the trial of all cases by a court without a jury.

II.

THE PROCEDURE APPROVED BY THE COURTS BELOW HAS NO BASIS IN THE CASE LAW INTERPRETING RULE 60(b)(5).

Cross-petitioners respectfully submit that there is no reported case in which it has been held, as it has been held to date in this case, that Rule 60(b)(5) may properly be invoked to enable the movants to seek relief from a final outstanding judgment on the grounds that there has been a change in the applicable law, whether case law or statute, where there has not been an indisputable change in the law. We challenge cross-respondents to cite one such case to this Court.

The few cases on which the District Court relied in ruling that cross-respondents' Rule 60(b)(5) motions were "procedurally firm" all expressly hold, to use the precise words of the District Court, that there may be relief from a judgment where there is "a change in the decisional law which makes it

no longer equitable to enforce the judgment" (A14-A15). As noted above, however, the District Court expressly acknowledged that there was no such change in the decisional law in this case by denying cross-respondents' motions for that very reason.

What the District Court, and the Court of Appeals, by its affirmance of the order of the District Court, did in effect in this case was to accept cross-respondents' argument that the comments in the opinions of the Justices in *Kiryas Joel* "not only portend a significant change in the law, but actually constitute one" (A14), even though, as noted above, the District Court expressly acknowledged that those comments hardly qualified as a change in the law (A20).

More to the point, what the courts below have done in this case, to use once again the precise words of the District Court, was to rule that cross-respondents have the right *"to resuscitate pursuant to Rule 60(b)(5) the issue they lost in 1985"* (A16). In other words, the courts below have ruled that a party or parties adversely affected by a judgment may use Rule 60(b)(5) in order to have a rehearing of the appeal of that judgment, or a second appeal, on the same record, more than a decade after they have lost their first and only permissible appeal. It is respectfully submitted that such is not, and never has been, the purpose of Rule 60(b)(5) according to any decision of any court or comment of any reputable authority.

Cross-respondents submit that there can be little doubt that cross-petitioners are in effect asking for a rehearing of, or second appeal from, the determination of this Court in *Aguilar* on the basis of the original record. In the Rule 60(b)(5) motions in the District Court, the Chancellor and the Board of Education submitted the joint record on appeal in *Aguilar,* which, if their pending petition is granted, will be the record on reconsideration

of the prior determination in this case. Hereinbelow, cross-petitioners will ask the Court to consider the inadequacy of that record for that purpose. Suffice it to note here, that the declarations of Board personnel, also submitted in support of the Rule 60(b)(5) motions (A25-A100, A132-156), add nothing of consequence bearing on the constitutional issues previously resolved in *Aguilar.*

First of all, those declarations of Board personnel relate, not to the original Title I plan at issue in *Aguilar,* but only to the Alternative Plan developed and placed in operation after, and as a result of, the prior determination of this Court in this case. Secondly, the declarations in question purport to demonstrate the alleged financial and administrative burdens imposed upon the Board by *Aguilar,* which, as noted above, are unavailing to avoid a command of the Constitution. It bears repeating, therefore, that the only basis on which cross-respondents seek to have this Court reconsider the constitutional issues previously determined in *Aguilar* is a record on appeal relating to a factual and legal situation that has not existed since 1985. In short, under the guise of a Rule 60(b)(5) motion, cross-respondents are seeking a rehearing of their appeal eleven years after the fact.

III.

THE PROCEDURE APPROVED BY THE COURTS BELOW HAS NO BASIS IN THE POLICY AND PRACTICE OF THIS COURT IN REHEARING OR RECONSIDERING A PRIOR DETERMINATION OF THE COURT.

It is further respectfully submitted that it is not, and never has been, the policy of this Court, under any rule, to entertain a petition seeking a rehearing of an appeal to the Court this far

out of time as a means of reconsidering a prior final determination of the Court. If there is any doubt on this point, it should be resolved by the exposition on the subject in the brief submitted by the Secretary of the United States Department of Education in support of the petitions of the cross-respondents.

In his brief, the Secretary describes succinctly the normal policy of this Court in reconsidering one of its prior determinations:

> Thus, although an appellate court (including this Court) has the power to reconsider its prior decisions, there is a policy embodied in the law-of-the-case doctrine against readily permitting parties to reopen litigation for the purpose of seeking reexamination of a legal ruling issued by an appellate court in the same case.
>
> Those particular jurisprudential concerns would be lessened if a person other than petitioners in this case commenced litigation intended to seek reconsideration of *Aguilar* by this Court. To be sure, *Aguilar* is a precedent of nationwide application and therefore binding on all lower courts under the doctrine of *stare decisis*. But other persons, including school districts other than that of the City of New York, that are not bound by the injunction issued by the district court on remand from this Court [in 1985] would not face the same problem of the law of the case presented in this case.

(Sec. Br., pp. 12-13).

The policy and practice to which the Secretary refers in the final paragraph of the foregoing passage is, of course, this Court's traditional way of reexamining a prior legal ruling — *i.e.*, in the context of an actual, current dispute in an action in which the prior ruling is called into question, based on facts that have been developed in the course of the pending action and are contained in the record on appeal to this Court. That policy and practice, it should be added, are in the great common law tradition which rejects the development of law through the consideration of theoretical questions on the basis of hypothetical sets of facts that may not exist, and may never come into existence, or may have existed in the past, but are not relevant under present circumstances.

Such, for example, is the policy and practice this Court has recently followed in re-examining its legal ruling in another major case involving the Establishment Clause, *Engel v. Vitale*, 370 U.S. 421 (1962) (holding that the recitation of a State-devised prayer, led by teachers, at the opening of the first class of each day in public elementary schools violates the Establishment Clause), recently re-examined by this Court in *Lee v. Weisman*, 112 S. Ct. 2649 (1992) (holding that the recitation of a prayer as part of the official program at a public high school graduation also violates the Establishment Clause).

The Secretary notes further that there is at least one case that may in the near future come before this Court in which the Court will have the opportunity to reexamine its ruling in *Aguilar*, specifically, *Helms v. Cody*, 856 F. Supp. 1102 (E.D. La. 1994) (holding that a State program under which public school teachers provide special education inside parochial schools violates Establishment Clause; motion to reconsider pending).

The Secretary suggests another procedure in which cross-

respondents and he might more properly challenge the ruling in *Aguilar* — *i.e.*, in a declaratory judgment action in which the opposing party or parties would have the opportunity to prepare "a full defense against reconsideration of *Aguilar*, and of preparing a record to that end" (Sec. Br., P. 15, n. 9). He expresses the opinion that in any such action "there would be a problem in a future case of identifying a nongovermnental defendant to [such] declaratory judgment action ready, willing and able to undertake the cost of presenting [such] defense . . ." (*Id.*) Cross-petitioners see no such problem[4] or why the defendant or defendants in such action must be "nongovernmental," as opposed to local school boards that wish to undertake the cost of presenting a defense against reconsideration of *Aguilar*.

Despite the foregoing, both at the beginning and the end of the argument section of his brief, the Secretary suggests that this Court accept the petitions of cross-respondents in this case, not as appeals from the denials of their motions under Rule 60(b)(5), but as applications for a rehearing of the Court's prior determination in the case (Sec. Br., p. 11, n. 5; p. 16). As noted above, that is precisely what cross-defendants have improperly sought under Rule 60(b)(5), but aside from, the fact that the Secretary can muster little precedent for such treatment, and the fact that, as applications for a rehearing, the Rule 60(b)(5) motions are woefully out of time, the Secretary ignores two salient facts that cross-respondents will ask this Court to consider immediately below, namely, that any such treatment of cross-respondents' motions will create an abominable precedent and that it will bring up for reconsideration by this Court its prior

4. In the District Court in this case, the defendants-intervenors proposed instituting just such a declaratory judgment action, by having the defendants and the defendants-intervenors in the *PEARL* case amend their answers to include a counterclaim for such relief, as an alternative to the Rule 60(b)(5) motions, but they subsequently abandoned the idea.

determination in this case in 1985 on a record that does not present "a full defense against reconsideration" thereof.

IV.

THE PROCEDURE APPROVED BY THE COURTS BELOW WILL UNNECESSARILY BURDEN THIS COURT AND LOWER FEDERAL COURTS WITH MOTIONS UNDER RULE 60(b)(5) THAT ARE AS UNWARRANTED AS THOSE OF CROSS-RESPONDENTS IN THIS CASE.

As noted above, the Rule 60(b)(5) motions in this case were prompted by the comments of Justices of this Court in *Kiryas Joel,* and the decisions of the courts below that the motions were procedurally firm are based primarily, if not entirely, on those comments. Significantly, the order of the District Court contains the notice at its head that it is "Not for Publication." (This notice is omitted in the reproduction of the order on page A6 of the appendix to the petition of the Chancellor and Board of Education, but it can be seen on page 1a of the appendix to the petition of cross-respondents Agostini, *et al.*) The summary order of the Court of Appeals is preceded by a much longer notice containing the directive that the order

> MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA (A4).

If, however, the petitions of cross-respondents are granted, it seems clear that the procedural facts of this case will not only receive wide notice, but they will also establish a precedent of the highest authority. Cross-petitioners respectfully submit that such precedent will in the future unnecessarily burden this Court and lower federal courts with motions under Rule 60(b)(5) seeking rehearings of appeals in outstanding and long-standing final judgments.

As this Court well knows, many of its decisions of the gravest importance have been decided by a 5-4 vote of the Justices of the Court. If all that is needed to make a motion under Rule 60(b)(5) seeking "relief" from such a 5-4 decision "procedurally firm" are the opinions, or votes, of the Justices in the minority coupled with the fact that one of the Justices in the majority has, by reason of death or resignation, been replaced by a Justice who has previously expressed disagreement with the decision, the party or parties adversely affected by the decision will be more than likely to make just such a motion with every reason to believe that, even if denied below, it will be considered favorably by this Court.

V.

THE PROCEDURE APPROVED BY THE COURTS BELOW WILL, IF COUNTENANCED BY THIS COURT, BRING UP FOR RECONSIDERATION BY THIS COURT ITS PRIOR DETERMINATION IN THIS CASE BASED ON A RECORD THAT IS INADEQUATE AND OUT-OF-DATE RELATING TO A PROGRAM THAT IS NO LONGER IN OPERATION, THAT WAS DEVELOPED UNDER A STATUTE NOW SIGNIFICANTLY MODIFIED, AND THAT CROSS-RESPONDENTS THEMSELVES HAVE NO INTENTION OF RE-INSTITUTING WITHOUT SIGNIFICANT CHANGES.

A. The Record In *Aguilar* Is Inadequate For The Purpose Of Reconsideration Of The Determination Therein By This Court At This Time.

To begin with, if the petitions of cross-respondents are granted, the determination of this Court in *Aguilar* will come before this Court for reconsideration without the Court having had the benefit, as it virtually always has in cases of this magnitude, of any reconsideration of the grave constitutional issues involved by either of the courts below. There is no discussion of any of those issues, as opposed to the procedural issues, in the memorandum and order of the District Court, and certainly none in the one sentence summary order of the Court of Appeals. Cross-petitioners respectfully ask this Court to compare in this respect the orders below with the order of the Court of Appeals reflected in the lengthy opinion of Judge Friendly which was available to this Court when this case first came before the Court and which contained a detailed analysis of the facts then pertinent and the law then applicable to the issues in this case (739 F.2d 48-72).

The reason for this unusual circumstance is directly related to the improper use of Rule 60(b)(5) in this case. Under that Rule, there is no need for a court to consider the merits of the judgment from which "relief" is sought. The only issue before the court is whether that judgment or the rule of law on which it is based has in fact been changed.

The more serious defect in the manner in which this case once again will come before this Court, if the petitions of cross-respondents are granted, has already been indicated: it is that the only record before the Court of any consequence will be the outdated record on appeal in *Aguilar*. The nature of this defect requires a brief review of the status of the applicable law when this case was proceeding through the courts below to this Court between 1978 and 1984.

In those years, the precedential law most applicable to this case was that expounded by this Court in the single case of *Meek v. Pittenger*, 421 U.S. 349 (1975). In *Meek*, this Court had held that a government program that placed public-employed and paid teachers in religious schools for the purpose of providing instruction to the students of those schools would require such intense monitoring of the teachers to ensure that they did not further the religious mission of the schools as to result in "excessive entanglement" between church and state. So clear and indisputable was the precedent in *Meek* that cross-petitioners, perhaps inappropriately, cited that case in our complaint in this case. We subsequently entered into a stipulation of facts prepared by the original defendants once we were satisfied that the stipulation established that under the original Title I program Title I personnel performed their services on the premises of the participating religious schools.

Correspondingly, to overcome *Meek*, the original defendants in this case relied on the precautions taken by the

Board of Education to ensure that Title I personnel performing services on the premises of religious schools did not further the religious mission of those schools and on the absence of any reported instance in which any such personnel had been found to have engaged in any such conduct.

Although a unanimous Court of Appeals for the Second Circuit, speaking through Judge Friendly, indicated other reasons why the original Title I program as conducted on the premises of religious schools in New York City was constitutionally impermissible, the Court of Appeals based its original decision in this case on the precedent in *Meek* and the doctrine of "excessive entanglement" (739 F.2d at 64).

Subsequently, this Court affirmed the decision of the Court of Appeals in a decision and opinion, written by Justice Brennan and joined in by four other Justices, which has been interpreted by cross-respondents, among others, as also based solely on the precedent in *Meek* and the doctrine of "excessive entanglement" (473 U.S. 402). Cross-petitioners believe that the determination of this Court in *Aguilar* as reflected in the opinion of Justice Brennan is broader in scope, but we do not press that point here. Indeed, if the reading of *Aguilar* by cross-respondents is correct, it supports our point that the record in *Aguilar* is inadequate for reconsideration of the determination therein.

In *Grand Rapids,* however, the case that was heard and decided by this Court on the same day as *Aguilar,* because the two cases were so similar in so many respects, this Court's decision, also reflected in an opinion by Justice Brennan, was clearly broader in scope than cross-respondents claim with respect to *Aguilar.* In *Grand Rapids,* two programs of the school district of the same name in which publicly-employed and paid teachers provided instruction in several "secular" courses on

the premises of religious schools, were held to be constitutionally impermissible for two reasons in addition to "excessive entanglement." Those reasons are best and most succinctly stated in the words of Justice Brennan:

> The symbolic union of church and state inherent in the provision of secular, state-provided instruction in the religious school buildings threatens to convey a message of state support for religion to students and the general public. Finally, the programs in effect subsidize the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects

(473 U.S. at 397).

It is the concern of cross-petitioners that the record in *Aguilar*, developed over a decade ago in reliance on the precedent established in *Meek* and, therefore, on the single, undisputed fact that under the original Title I program publicly-employed and paid teachers and counselors performed services on the premises of religious schools, will be inadequate to enable this Court properly to evaluate the issue or issues of whether the two powerful reasons advanced in *Grand Rapids* for invalidating the programs in that case are not equally applicable to the program in *Aguilar*. Of particular concern are the facts relating to the issue of whether or not government-provided so-called "remedial instruction" in such basic subjects as reading and mathematics in religious schools is as much a subsidization of "the religious functions of the parochial schools by taking over their responsibility for teaching secular subjects" as the instruction provided in art, music and physical education in the programs struck down in *Grand Rapids*.

Cross-respondents do not here argue the merits of the issue or issues posed by the determination of this Court in *Grand Rapids*. That is not the point of our petition. What we do stress here is that allowing cross-respondents "to resuscitate pursuant to Rule 60(b) the issue they lost in 1985" and to obtain a rehearing of the original appeal in *Aguilar* on the basis of the record in 1985, which the District Court approved of their doing (A16), is as unjustifiable as crediting the assumption that the comments concerning *Aguilar* made by Justices of this Court in *Kiryas Joel*, without the benefit of briefing and oral argument, reflect their final opinion on the subject, which the District Court declined to do *(Id.*, n. 3). If, moreover, pertinent facts that support a party's position are not in the record, no amount of briefing or oral argument in support of that position is likely to prevail.

B. The Program Or Plan In Question In *Aguilar* Has Not Been In Operation For Eleven Years; It Was Developed Under A Statute That Has Been Significantly Modified; And Cross-Respondents Themselves Have No Intention Of Re-Instituting That Plan Without Significant Changes.

The foregoing situation is compounded by the fact that the Title I program under consideration by this Court in 1985 has not been in operation since that year, the statute under which it was developed has been significantly modified, and the cross-respondents themselves do not foresee that, if their petition is granted and the original Title I program deemed to be constitutionally permissible, the program will ever be re-instituted in its original form.

Changes in the statute under which the original Title I program under consideration in *Aguilar* was developed, Title I of the Elementary and Secondary Education Act of 1965 (*see* pages 3 and 4 of the petition of cross-respondents Agostini, *et*

al.), have resulted in allowing participating schools to use their Title I funds for *school wide programs*, and a central provision in the most recent statute, the Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518 (codified in relevant part as 20 U.S.C. §§ 6301-38), has substantially broadened the use of Title I funds for such programs. The provision reads, in pertinent part, as follows:

> **§ 6314 Schoolwide programs**
>
> **(a) Use of funds for schoolwide programs**
>
> **(1) In general**
>
> A local educational agency may use funds under this part, in combination with other Federal State and local funds, in order to upgrade *the entire educational program in a school des*cribed in subparagraph (A) or (B) if, for the initial year of the schoolwide program, the school meets either of the following criteria:
>
> * * *
>
> (B) For the school year 1996-1997 and subsequent years
>
> (i) the school serves an eligible school attendance area in which not less than 50 percent of the children are from low-income families; or
>
> (ii) not less than 50 percent of the children enrolled in the school are from such families.

* * *

(3) Identification

(A) *No school participating in a schoolwide program shall be required to identify particular children under this part as eligible to participate in a schoolwide program or to provide supplemental services to such children* (Cross-petitioners' italics).

Such Title I schoolwide projects in New York City have been authoritatively described as follows:

Under this method, services are provided to the entire school; all students in the school are considered Chapter 1 [now, once again, "Title I" under the the 1994 statute] eligible and receive services. The goal of schoolwide projects is the redesign of the curriculum for the entire school body. The focus is on schoolwide problem areas which require improvement.

. . . In schoolwide projects, there are no identified Chapter 1 teachers or other staff serving identified Chapter 1 students. *Instead the funds are used to address the needs of all students in the school.* In one school, Chapter 1 funds could be used to hire a librarian, in another school, to hire additional guidance counselors, in a third, to reduce class size and in a fourth, to buy computers. (Declaration in the *PEARL* case of Michele I. Nowosad, Executive Director of the

Division of Funded and External Programs of the Board of Education, 6/8/95, p. 11, pars. 25-26; cross-petitioners' italics).

It bears emphasizing that there were no such provisions in the original Title I statute under which the plan in question in *Aguilar* was developed. There is nothing, morever, in the record on which cross-respondents seek to have a rehearing of the prior determination in this case concerning whether Title I funds are now being used, or the extent of their use, by participating religious schools for the schoolwide purposes of those schools. It is respectfully submitted that any such use of public tax funds bears heavily on the issue of whether the program in which they are used "in effect subsidize[s] the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects . . ." (473 U.S. at 397).

In her declaration in the *PEARL* case, Ms. Nowosad also pointed out that in Title I remedial instruction, the Board of Education now prefers the so-called "push-in" instead of the "pull-out" method of instruction. Under the "push-in" method of providing Chapter 1 services, the *Chapter 1 teacher together with the regular classroom teacher provides instruction to the entire class,* with special attention being given to the educational needs of the Chapter 1 students. (*Id.*, p. 10, par. 22; cross-petitioners' italics).

Under the "pull-out" method employed by the Board of Education in the original Title I program on the premises of religious schools in 1985, prior to *Aguilar,* students receiving remedial instruction inside those schools were "pulled out" of their regular classrooms into separate classrooms designated as "Title I Classrooms" (*Id.*, p. 9, par. 18).

It is clear, therefore, that current Title I practices with respect to the present "pull-in" method of instructing Title I students, if adopted in any reinstituted Title I program on the premises of religious schools, will bear heavily on the issue of whether the program will further establish a "symbolic union of church and state" and thereby "convey a message of state support of religion to the students . . ." (473 U.S. at 397).

In the petition of cross-respondents Agostini *et al.*, it is stated that —

> The question in this case is whether the Establishment Clause prohibits a local school board from providing remedial educational services to eligible parochial school children *in the same setting as their public school counterparts* — on the premises of their regular schools. (Agostini Pet., pp. 10-11; cross-petitioners' italics).

It is respectfully submitted that an essential preliminary question to the foregoing question posed by cross-respondents must be: Precisely what "services" and in what "setting"?

When this case was, recently, before the Court of Appeals, cross-petitioners requested that court, if it was of the opinion that cross-respondents should have the opportunity in this case to have this Court reconsider its prior determination in the case, to remand the case to the District Court in order to enable cross-petitioners, and cross-respondents if they were so advised, to develop a record, with full discovery and any necessary hearing or trial of questions of fact, that would be more adequate and up-to-date than the record before this Court in 1985, and would take into account subsequent facts and events that might be pertinent in the light of the determination of this Court in *Grand*

Rapids and subsequent decisional law that might be applicable. The Court of Appeals declined to do so, at least implicitly (A5).

If, despite all the defects in the procedure under Rule 60(b)(5) followed by cross-respondents and approved by the courts below, this Court wishes to reconsider its determination in *Aguilar* pursuant to such procedure, cross-petitioners respectfully suggest that the Court direct the remand that we requested of the Court of Appeals, adding only that, on any such remand, the Board of Education should be required to submit the specific plan it proposes to re-institute on the premises of participating religious schools so that this Court will know precisely what is at issue.

We note that, in his brief, the Secretary of the United States Department of Education, has made what appears to be the same suggestion.[5]

CONCLUSION

It is respectfully submitted that this cross-petition for a writ of certiorari should be granted to the end that the procedure under Rule 60(b)(5) of the Federal Rules of Civil Procedure followed by the cross-respondents and approved by the courts below shall be roundly rejected by this Court as a means of obtaining a rehearing of the appeal to this Court, eleven years after the original hearing and essentially on the basis of the original record on appeal, that resulted in the prior determination of the Court in this case in *Aguilar v. Felton,* 473 U.S. 402

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5. "If the Court deemed it necessary, the record could be supplemented further on remand, were this Court first to conclude that its prior decision in this case should not stand as an absolute barrier to renewed adjudication of the propriety of furnishing Title I services inside religious schools" (Sec. Br., p. 15, n.9).

Alternatively, if, regardless of the propriety or impropriety of such procedure, this Court wishes to reconsider its prior determination in this case, it is respectfully submitted that the Court should remand the case to the District Court with instructions to conduct a plenary proceeding, including full discovery and any trial necessary to resolve questions of fact, concerning the issues raised by allowing Title I services to be re-instituted on the premises of the religious schools of New York City, with leave to cross-respondents to renew their petitions for a writ of certiorari in this Court upon the completion of such proceeding without further decision of the District Court or the Court of Appeals. It is further respectfully submitted that the instructions to the District Court should provide that, at the commencement of the proceeding therein, the Board of Education shall present the Title I program or plan it intends to institute on the premises of the religious schools should this Court permit it to do so.

Respectfully submitted,

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No. 96-890

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

BETTY-LOUISE FELTON, et al.,

Cross-Petitioners,

vs.

RACHEL AGOSTINI, et al.,

Cross-Respondents,

- and -

CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,

Cross-Respondents.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' BRIEF IN OPPOSITION TO CROSS-PETITION

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December 9, 1996.

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PETITIONERS' BRIEF IN OPPOSITION TO CROSS-PETITION

The Chancellor of the Board of Education of the City of New York and the Board of Education of the City of New York, petitioners under docket 96-553, submit this brief in opposition to the cross-petition filed by Respondents Betty-Louise Felton, et al.

It is petitioners' position that Respondents are not aggrieved by the order of the Court of Appeals, which affirmed the denial of petitioners' Rule 60(b) motion. The procedural argument as to the propriety of petitioners' use of a Rule 60(b) motion is properly raised in opposition to our petition. Accordingly the cross-petition should be denied.

We respectfully refer the Court to our Reply Brief under Docket No. 96-553

for our position on Respondents' procedural and substantive arguments.

CONCLUSION

The Cross-Petition should be denied.

Respectfully submitted,

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No. 96-890

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IN THE
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BETTY-LOUISE FELTON, ET AL.,
Cross-Petitioners,

v.

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OF THE CITY OF NEW YORK, ET AL.,
Cross-Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF IN OPPOSITION TO THE CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether there is any reason why the parties cannot invoke Rule 60(b) of the Federal Rules of Civil Procedure to seek relief from the continuing injunction entered after this Court's decision in *Aguilar v. Felton*.

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---

BRIEF IN OPPOSITION TO THE CROSS-PETITION FOR A WRIT OF CERTIORARI

The Cross-Petition for a Writ of Certiorari raises the question whether Rule 60(b) of the Federal Rules of Civil Procedure was properly invoked by the petitioners to seek relief from the judgment in this case. The cross-petition should be denied both because it is unnecessary and because the question it presents is insubstantial.

I. THE CROSS-PETITION IS UNNECESSARY

The respondents/cross-petitioners prevailed fully in the district court and in the court of appeals: the district court denied the petitioners' Rule 60(b) motions, and the court of appeals affirmed. The cross-petition does not attack any aspect of the judgment, but only suggests another reason why the judgment should not be disturbed. Under these circumstances, it is clear that a cross-petition is unnecessary.

A cross-petition is necessary if a party seeks to modify the judgment below in whole or in part. *See Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 560 n.11 (1976). But a cross-petition is not necessary to enable a prevailing party "to defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals." *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979). It is also well-established that a cross-petition is unnecessary to enable a party to attack the reasoning of the court below. *See, e.g., Massachusetts Mutual Life Insurance Co. v. Ludwig*, 426 U.S. 479, 480-81 (1976). A cross-petition is unnecessary in this case to present an additional reason why the courts below were correct in denying the Rule 60(b) motions.

II. THE QUESTION PRESENTED IN THE CROSS-PETITION IS INSUBSTANTIAL

The cross-petition attempts to question the procedure that was invoked by the petitioners and sanctioned by the courts below. The question it attempts to raise, however, is somewhat unclear. Rule 60(b) authorizes a motion for relief from the judgment, and it authorizes the granting of such relief for "any . . . reason justifying relief from the

operation of the judgment." Fed. R. Civ. P. 60(b)(6). Although the respondents/cross-petitioners attempt to cast their argument in different terms, in essence their argument is simply that there are not sufficient grounds to warrant relief under Rule 60(b).

The arguments advanced in the cross-petition were incorporated into the respondents' Brief in Opposition, where they properly belong. *See* Br. Opp. 12. The petitioners responded to those arguments in their Reply Brief in Support of the Petition. Instead of repeating their arguments in this brief, petitioners respectfully refer the Court to that Reply Brief. As demonstrated there, the procedural objection respondents/cross-petitioners attempt to raise is insubstantial.

CONCLUSION

For the foregoing reasons, the cross-petition should be denied.

Respectfully submitted,

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OCTOBER TERM, 1996

BETTY-LOUISE FELTON, ET AL., CROSS-PETITIONERS

v.

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ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECRETARY OF EDUCATION IN OPPOSITION

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QUESTION PRESENTED

Whether this case presents an appropriate occasion for reconsidering the Court's decision in *Aguilar* v. *Felton*, 473 U.S. 402 (1985).

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BRIEF FOR THE SECRETARY OF EDUCATION IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 11a-13a)[1] and the district court (Pet. App. 1a-10a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 1996. Petitions for a writ of certiorari in Nos. 96-552 and 96-553 were filed on October 7, 1996. The cross-petition for a writ of certiorari was filed on November 26, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] Unless otherwise indicated, "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 96-552.

STATEMENT

1. As we have explained in our response to the petitions for a writ of certiorari filed in Nos. 96-552 and 96-553, this case involves a federal program to provide remedial instruction and support services to needy elementary and secondary school students, known as the "Title I program."[2] See 20 U.S.C. 6301 *et seq.*

In 1978, six plaintiffs brought this action to challenge, as violative of the Establishment Clause of the First Amendment, the use of Title I funds to pay the salaries of public school teachers providing remedial instruction to students inside parochial schools. This Court held that such use of Title I funds did violate the Establishment Clause. *Aguilar* v. *Felton*, 473 U.S. 402 (1985). The Court concluded that the public school system's supervisory efforts to ensure that the instruction retained a purely secular content "inevitably results in the excessive entanglement of

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[2] The program at issue was originally known as "Title I," because it was first enacted as Title I of the Elementary and Secondary Education Act of 1965. In 1981, Congress enacted Chapter 1 of the Education Consolidation and Improvement Act, Pub. L. No. 97-35, Tit. V, Subtit. D, 95 Stat. 464, as a continuation of Title I, and the program became known as "Chapter 1." See *Aguilar* v. *Felton*, 473 U.S. 402, 404 n.1 (1985) (discussing the program's earlier history). In 1988, Congress enacted a new version of the program in the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. No. 100-297, §§ 1003(a), 6303(a), 102 Stat. 293, 431. Effective July 1, 1995, the Chapter 1 program again became known as "Title I," pursuant to the Improving America's Schools Act of 1994, Pub. L. No. 103-382, § 101, 108 Stat. 3519. The most recent legislation made substantive changes in the program, but none of those changes substantially affects the issues in this case.

church and state," 473 U.S. at 409, because "[a]gents of the city must visit and inspect the religious school regularly, alert for the subtle or overt pressure of religious matter in Title I classes," and "the religious school must obey these same agents when they make determinations as to what is and what is not a 'religious symbol' and thus off limits in a Title I classroom." *Id.* at 413.

On remand from this Court, the district court entered an injunction prohibiting the Secretary of Education and the Chancellor of the Board of Education of the City of New York from using public funds for any Title I program, to the extent that such use authorizes instructional and counseling services inside religious schools. Pet. App. 14a-16a.

2. In October and December 1995, petitioners in Nos. 96-552 and 96-553 filed motions pursuant to Federal Rule of Civil Procedure 60(b) for relief from the injunction entered by the district court on remand from this Court. The district court denied the motions. Pet. App. 1a-10a.

The district court first ruled that a Rule 60(b) motion was a proper mechanism for petitioners to present their request for relief from the injunction. Pet. App. 7a-10a. The court acknowledged that "Rule 60(b) may not be used as a substitute for appeal," but it found it "plain" that, in this case, a Rule 60(b) motion "does not offend that rule." Pet. App. 7a. Then, after quoting the separate views of several Justices in *Board of Education of Kiryas Joel School District* v. *Grumet*, 512 U.S. 687 (1994), regarding this Court's decision in *Aguilar*, the district court noted that "it is at least unusual, if not extraordinary, that the losing parties to a Supreme Court case can point to such promising indicia that they would win the

case now." Pet. App. 7a-8a. The district court concluded that, in such extraordinary circumstances, allowing petitioners "to resuscitate pursuant to Rule 60(b) the issue they lost in 1985 strikes the proper balance between the conflicting principles that litigation should have finality and that justice should be done." *Id.* at 7a-8a.

Addressing the "law of the case" doctrine, the district court noted that courts may depart from that rule for a "compelling reason" such as an "intervening change of law." Pet. App. 8a. The court thus accepted that, if petitioners were able to show "a sea change in the law" since this Court's decision in *Aguilar*, the law of the case doctrine would not preclude relief under Rule 60(b). *Ibid.* The court found further that the motion was not untimely, and that the plaintiffs who brought the original action would not suffer any cognizable prejudice as a result of any delay in bringing the Rule 60(b) motion. Pet. App. 8a-9a. The court expressly found that a motion for relief from the injunction was "far preferable" to requiring the school district to challenge the judgment by placing itself in contempt by disobeying the injunction. *Id.* at 9a.

Ultimately, however, the district court declined to afford petitioners relief from the judgment. The court observed that "[t]here may be good reason to conclude that [*Aguilar*'s] demise is imminent, but it has not yet occurred." Pet. App. 10a. The court also found it doubtful that it could anticipate any decision by this Court to reverse its own decision in this case. *Ibid.* The district court suggested, however, that "there could scarcely be a more appropriate vehicle for that review than the same case in which, eleven years later, the same school board is struggling with

the consequences of the Supreme Court's decision." *Ibid.*

The court of appeals affirmed, in a summary order, for "substantially the [same] reasons" as those stated in the district court's decision. Pet. App. 13a.

ARGUMENT

1. Cross-petitioners argue that the Court should grant the cross-petition to decide whether the lower courts erred in concluding that a motion filed under Federal Rule of Civil Procedure 60(b) was the proper method to present the request for relief from the injunction entered by the district court on remand from this Court in *Aguilar* v. *Felton*, 473 U.S. 402 (1985). Cross-Pet. 6. Although we agree that that issue warrants review by this Court, in conjunction with the question whether *Aguilar* should be reconsidered on its merits, granting the cross-petition is not necessary for the Court to reach the issue.

The cross-petitioners' argument that this case is an unsuitable vehicle for reconsideration of *Aguilar*, if accepted by the Court, would be an alternative basis for affirming the judgment of the court of appeals. Moreover, that argument was presented in the courts below by the cross-petitioners in opposition to the motions under Rule 60(b), and it was also raised as an argument in opposition to the petitions for a writ of certiorari in Nos. 96-552 and 96-553. See 96-552 Resp. Br. in Opp. 12. Accordingly, the cross-petitioners would be free to present that argument in the briefing on the merits in No. 96-552 or No. 96-553, should the Court grant the petition for a writ of certiorari in either case. See, *e.g.*, *Thigpen* v. *Roberts*, 468 U.S. 27, 32 (1984); *Dayton Board of Educ.* v. *Brinkman*, 433 U.S. 409, 419 (1977).

Furthermore, the question presented by the cross-petition is "fairly included" within the questions presented in the petitions in Nos. 96-552 and 96-553. See Sup. Ct. R. 14.1(a) The question presented by those petitions—whether the Court "should overrule" its decision in *Aguilar* (see 96-552 Pet. I)—is broad enough to include the question whether the Court should do so in this particular case. Where, as here, a question of law is a "predicate to intelligent resolution" of the question presented, it is "fairly included" within the question presented. *Vance* v. *Terrazas*, 444 U.S. 252, 258-259 n.5 (1980).[3]

2. The cross-petition makes two additional points that warrant response.

a. Cross-petitioners argue (Cross-Pet. 21-24) that Title I funds may be used for schoolwide programs, see 20 U.S.C. 6314, and that religious schools' use of Title I funds for schoolwide programs would violate the Establishment Clause. The Department of Education's current regulations and guidance make clear, however, that religious (and other private) schools may not participate in the schoolwide-improvement provisions of Title I. The relevant regulation, 34 C.F.R. 200.12(b), provides:

> An LEA [local educational agency] shall use funds under this subpart to meet the special educational needs of participating private school children, but not for—
>
> (1) The needs of the private school; or

---

[3] Notwithstanding the foregoing, we would not oppose granting the cross-petition, should the Court have doubt whether the issue presented could be addressed on review of the petitions in Nos. 96-552 and 96-553.

(2) The general needs of children in the private school.

Similarly, the Department's current policy guidance on the Title I program states that, "[b]ecause private schools are not eligible for Title I services [only their eligible children are], schoolwide programs may not be operated in private schools." See App., *infra*, 2a. See also 20 U.S.C. 6321(a)(2) (Title I services for students in private schools must be secular); 20 U.S.C. 6321(c) (Title I funds must remain under control of a public agency when used for benefit of students in private schools). Because the Department of Education is the federal agency charged with the administration of Title I, its regulations are entitled to deference. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Cross-petitioners are mistaken in suggesting that there were no such provisions for schoolwide-improvement programs in the Title I statute under which the plan in question in *Aguilar* was developed. Cross-Pet. 24. Although the original Title I statute enacted in 1965 did not contain such authority, a provision on schoolwide projects was added to the statute in 1978 (see 20 U.S.C. 2753 (1978); Education Amendments of 1978, Pub. L. No. 95-561, § 133, 92 Stat. 2176), and was in effect at the time of this Court's decision in *Aguilar* (see Pub. L. No. 98-211, § 3, 97 Stat. 1414 (1983)). We are informed by the Department of Education, however, that it never permitted religious schools to take advantage of the schoolwide-improvement provisions of the Title I statute under review in *Aguilar*.

b. Cross-petitioners also argue (Cross-Pet. 24-25) that the current record is inadequate because

the so-called "push-in" program permitted in public schools—under which a "[Title] I teacher together with the regular classroom teacher provides instruction to the entire class" (Cross-Pet. 24)—presents concerns different from those at issue in the *Aguilar* decision and creates constitutional problems not presented earlier in this case. As far as we are aware, however, no plan for such a "push-in" program in religious schools has ever been submitted by the City of New York to the Department of Education, or submitted to the City by a religious school. See 96-553 Reply Br. 5-6.[4] The concern raised by cross-petitioners based on the "push-in" program, therefore, is entirely speculative, and does not counsel against this Court's reconsideration of its decision in *Aguilar*.

---

[4] Even before this Court's decision in *Aguilar*, the City of New York required that Title I instructors be insulated from any religious influence by the school in which the instruction was taking place. The City required that "the administrators of the parochial schools * * * clear the classrooms used by the public school personnel of all religious symbols," and that "[t]he professionals involved in the program * * * avoid involvement with religious activities that are conducted within the private schools." 473 U.S. at 407. To ensure that no religious education could occur during Title I class time, only "remedial reading, reading skills, remedial mathematics, English as a second language, and guidance services" were to be provided by Title I personnel (*id.* at 406), and Title I personnel were required "to bar religious materials in their classrooms" (*id.* at 407).

CONCLUSION

The cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1996

APPENDIX

TITLE I, PART A
POLICY GUIDANCE

IMPROVING BASIC PROGRAMS OPERATED BY LOCAL EDUCATIONAL AGENCIES

[SEAL OMITTED]

U.S. DEPARTMENT OF EDUCATION
Office of Elementary and Secondary Education
Compensatory Education Programs

April 1996

* * * * *

PROVIDING SERVICES TO ELIGIBLE PRIVATE SCHOOL CHILDREN

* * * * *

[p. 13]

Q5. If a school in the attendance area in which eligible private school students reside is operating a schoolwide program, are private school students to be offered a schoolwide program?

A. No. Because private schools are not eligible for Title I services, schoolwide programs may not be operated in private schools. However, eligible private school children residing in an area served by a schoolwide program school must be offered equitable services.

Q6. May an LEA provide services to private school children that are not equitable to those provided to public school children, if, after receiving an offer of equitable services, the private school officials or parents choose to have the children participate in only some of the services?

A. The statute requires that an LEA offer equitable services to private school children; it does not require that private school children accept or participate in all those services. If private school officials or parents choose to have their children participate in only some of those services, and decline participation in others, the LEA will have met its responsibility by providing those services in which private school children wish to participate. LEAs should continue to offer equitable services in future years, however, rather than offering only those services in which children participated in the past.

Q7. When a child residing in a Title I attendance area in one LEA attends a private school in another LEA, which LEA, if any, is responsible for serving the child?

A. The LEA in which the child resides is responsible to provide services for the child. The LEA may,

however, arrange to have services provided by another LEA, reimbursing that LEA for costs.

Q8. May an LEA establish a minimum number of private school children selected for the program in order to establish a Title I program near the private school? If so, what is the LEA's responsibility to serve children attending private schools with fewer than that minimum number?

A. Section 1120(a) of Title I requires that LEAs provide for the participation, on an equitable basis, of eligible children enrolled in private schools. The requirement applies regardless of the number of children attending a private school. However, when the number of eligible children at one location is very small, the cost of establishing certain types of programs to serve them may be prohibitive, especially when these children may be from several grades or have different educational needs. In this case, other options should be considered. For instance, if it is feasible and equitable, LEAs may adopt methods, such as take-home computer programs, individual tutoring programs, or professional development activities.

* * * * *

No. 96-890

(5)

Supreme Court, U.S.
FILED
DEC 30 1996
CLERK

In The

Supreme Court of the United States

October Term, 1996

BETTY-LOUISE FELTON, *et al.*,

Cross-Petitioners,

vs.

RACHEL AGOSTINI, *et al.*,

Cross-Respondents,

-and-

CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, *et al.*,

Cross-Respondents.

On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF IN SUPPORT OF CROSS-PETITION FOR A WRIT OF CERTIORARI

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In their briefs in opposition to the cross-petition and also in their reply briefs in support of their own petitions, in both of which petitioners see fit to address the issues raised in the cross-petition, petitioners, aided by the defendant Secretary, United States Department of Education, make a protean effort to obfuscate the serious threshold procedural question posed in the cross-petition.

That question is whether, 11, or perhaps it will be 12, years after having lost an appeal in this Court, petitioners may, on the same record, have a rehearing of their appeal in the guise of a motion for relief from a judgment under Rule 60(b) of the Federal Rules of Civil Procedure, for which that Rule was never intended and has never been invoked.

FURTHER REASONS FOR GRANTING THE CROSS-PETITION

I.

RAISING THE PROCEDURAL QUESTION BY CROSS-PETITION IS NECESSARY AND PROPER.

The claim of petitioners and the Secretary that the cross-petition is allegedly unnecessary or improper is based on the false premise that cross-petitioners appear in this Court as the "prevailing" parties rather than as "aggrieved" parties, and as such may, or should, have raised the procedural question in their brief in opposition to the petitions. Any such premise disregards the history of these proceedings and the posture of the proceedings in this Court.

There were at most two issues considered and decided by the courts below: (1) whether the Rule 60(b) motions were procedurally proper, and (2) whether the courts below had the power to grant relief from an outstanding judgment that was

entered pursuant to the mandate of this Court. (It bears noting that the courts below at no point addressed themselves to the sole question posed in the petitions — i.e., whether *Aguilar v. Felton*, 473 U.S. 402 (1985) should be overruled.)

The second of the aforementioned issues was actually a "non-issue." There never was any real doubt in the minds of any of the parties that the courts below lacked the power to overrule an outstanding determination of this Court. The lead defendant in this case, the Secretary, established that point beyond any reasonable doubt when he explained to the District Court why he was not joining in the Rule 60(b) motions. The District Court in turn gave that "non-issue" short shrift in its decision and order in which the District Court devoted virtually all of its comments to the only real issue, that concerning whether the motions were "procedurally firm."

In any event, as far as petitioners are concerned, the "non-issue" concerning whether the courts below had the power to overrule an outstanding determination of this Court has disappeared now that the parties are before this Court, which undoubtedly has the power to overrule one of its prior determinations. At this stage of the proceedings, therefore, there is only one issue considered and decided by the courts below — that concerning whether the Rule 60(b) motions are procedurally proper — which may be said to be viable. On that issue, cross-petitioners lost in the District Court, cross-appealed in the Court of Appeals (without any claim on petitioners' part that we lacked the right to cross-appeal), and lost in the Court of Appeals.

In short, cross-petitioners appear before this Court, not as the "prevailing" parties, but as the sole "aggrieved" parties on the one issue considered and decided by the courts below that remains viable in this Court. It was incumbent on us, therefore, in order to press our case in this Court to file a petition for a writ of certiorari.

A comment made in the cross-petition will help to enforce the foregoing analysis. If the "non-issue" concerning whether the courts below had the power to overrule an outstanding determination of this Court were to be considered the issue on which cross-petitioners were the "prevailing" parties in the courts below, and if that issue continues to be the one on which petitioners seek redress as the "aggrieved" parties in this Court, these proceedings would be at an end for that reason alone. There can be no question that the courts below were correct in their decision on that issue, and that their decision should be affirmed.

In light of the foregoing, all of the cases cited by petitioners and the Secretary are inapposite which hold that the cross-petition is allegedly unnecessary or improper because cross-petitioners allegedly appear before this Court as the "prevailing" parties entitled as such to have raised in our brief in opposition to our adversaries' petitions any issue briefed, considered or decided in the courts below.

Additionally, it should be noted that the position taken by the Agostini petitioners and the Secretary, as opposed to that taken by the City petitioners, that the cross-petition is allegedly unnecessary, does not mean that it is improper. What the Agostini petitioners and the Secretary argue, in effect, is that cross-petitioners should have relied on the proposition that a cross-petition is allegedly unnecessary to raise what we believe to be the serious threshold procedural question presented in these proceedings concerning petitioners' misuse of Rule 60(b) and that we should have raised that question in our brief in opposition to their petitions. Cross-petitioners submit that we would have been foolhardy to have taken that risk and to have been faced with a potential claim in petitioners' reply briefs, to which we would not have been entitled to respond, that we had improperly raised a question we were required to have preserved in a cross-petition!

Such a risk would have been even greater had we relied on the Secretary's proposition that the question of petitioners' misuse of Rule 60(b) is "fairly included" in the question presented in the petitions concerning whether this Court should overrule its determination in *Aguilar.*

With respect to the position taken by the City petitioners to the effect that the cross-petition is allegedly improper because cross-petitioners are allegedly not "aggrieved" parties, cross-petitioners have noted above that we are in fact aggrieved parties on the only issue considered and decided by the courts below that remains viable in this Court. Assuming, however, that we are "prevailing" parties because of the denial of the Rule 60(b) motions by the courts below on the basis of their lack of power to overrule an outstanding determination of this Court, there is good authority that we are still sufficiently "aggrieved" by the adverse holding of the courts below that the motions are "procedurally firm" to be entitled to file a cross-petition addressing that adverse holding. *Deposit Guaranty Nat. Bank v. Roper,* 445 U.S. 326, 334-35 (1980); *Electrical Fittings Corp. v. Thomas & Betts Co.,* 307 U.S. 241 (1939).

There remains the argument of the Agostini petitioners that the serious threshold procedural question presented by the cross-petition is allegedly "insubstantial." This argument ignores the fact that the District Court devoted virtually all of its opinion to that question, the Secretary devoted a good portion of his initial brief in support of the petitions to the same question, and the Agostini petitioners themselves devote one of the three points in their reply brief in support of their petition to the question.

The alleged basis for the claim of "insubstantiality" is the provision in Rule 60(b)(6) which authorizes the granting of relief from a judgment "for any other reason justifying relief from the operation of the judgment." (The Agostini petitioners omit the

word "other" which makes it appear as if the preceding clauses of Rule 60(b) serve no purpose.) Cross-petitioners respectfully submit that any such construction of Rule 60(b)(6) would make a shambles of the doctrine of *stare decisis* and the Federal Rules of Appellate Procedure.

II.

PETITIONERS AND THE SECRETARY CITE NO CASE AND MAKE NO ARGUMENT THAT JUSTIFIES PETITIONERS' EGREGIOUS MISUSE OF RULE 60(b).

In their briefs in opposition to the cross-petition, petitioners cite no case that in any way sanctions the procedure they have followed in these proceedings in which, it bears repeating, they have used Rule 60(b) to apply for a rehearing of an appeal they lost 11 or 12 years ago on the basis of the original record on appeal. Cross-petitioners submit that the doctrine, advanced by petitioners, that enables a District Court, sitting in equity, to modify or vacate an injunction order originating in that court because of a change in the factual circumstances on the basis of which the injunction order was issued is hardly applicable to the facts of the present proceedings, whether or not the original injunction order of the District Court was affirmed by this Court.

As cross-petitioners have noted repeatedly, the injunction in this case did not originate in the District Court in which petitioners have sought to vacate it. It originated as the result of, and incidental to, a determination by this Court that a practice followed by the Board of Education of the City of New York (sending publicly-employed teachers and counselors into religious schools to teach and counsel students attending those schools) is in violation of the Constitution. Unlike an injunction issued by a District Court acting under its discretionary power to modify or vacate its own injunction, such a determination of

this Court is not only beyond the power of any lower court to change; it has also been, until the present, beyond the right or privilege of any party to seek to change in a proceeding brought in a District Court for that sole purpose, whether under Rule 60(b) or any other rule of law.

Additionally, the determination of this Court in *Aguilar* was not based on principles of equity, but on the principle of separation (or independence, as opposed to interdependence) of church and state embodied in the Establishment Clause of the First Amendment to the Constitution. The injunction mandated by that determination, therefore, is not subject to being vacated or modified by a change in factual "circumstances," as in the few cases cited by petitioners, especially if the change does not eliminate the practice prohibited by the Constitution.

Petitioners complain, to quote Agostini *et al.*, of being "stuck" with the determination in *Aguilar* until that determination might be vacated by this Court in a proper case. That, however, is the situation of any party affected adversely by a determination of this Court, even one as mighty as the Board of Education of the City of New York. In some instances, the only relief from a determination of this Court may lie in the long, slow process of constitutional amendment. In this instance, petitioners may only have to wait, as the City petitioners acknowledge, until *Helms v. Cody*, 856 F. Supp. 1102 (E.D. La. 1994), reaches this Court.

Petitioners may not even have to wait for *Helms v. Cody* to reach this Court. In their briefs in opposition, they ignore the procedure cross-petitioners and the Secretary have suggested to the Court by which the petitions would be denied, or perhaps withdrawn, without prejudice to reinstatement after a remand to the District Court for a plenary hearing which will bring the 11- or 12-year old record on appeal in *Aguilar* up to date

concerning facts pertinent to any proper reconsideration of this Court's prior determination in this case.

Lastly, petitioners try to minimize the precedent of their being allowed to misuse Rule 60(b) to take advantage of the comments of five Justices of this Court in *Board of Education of Kiryas Joel v. Grumet,* 114 S. Ct. 2481 (1994). The City petitioners argue only that cross-petitioners "raise false fears" because "[t]his is not an ordinary case, finally resolving a private dispute" (City Rep. Br., p. 3). Cross-petitioners submit that such an argument is meaningless and specious on its face.

The Agostini petitioners rely on the statement in this Court's opinion in *Standard Oil Co. v. United States,* 429 U.S. 17, 19 (1976), to the effect that the Court has "confidence in the ability of district courts to recognize frivolous rule 60(b) motions." With all due respect, cross-petitioners continue to wonder how, if petitioners are allowed to prevail on their motions, a District Court will distinguish between this case and any one in which there has been a vigorous four-vote dissent in this Court and a Justice has subsequently joined the Court whose views are known, or suspected, to favor the position of the dissenters.

III.

THE VERY RECENT PRONOUNCEMENTS OF THE SECRETARY ON SCHOOLWIDE PROGRAMS SERVE TO EMPHASIS THE LACK OF A PROPER RECORD FOR RECONSIDERATION OF *AGUILAR.*

In his brief in opposition to the cross-petition, the Secretary notes that, in April of this year, for the first time, he issued a "policy guidance" in which, contrary to the plain language of the pertinent provisions of the current Title I statute, he has advised that "schoolwide programs may not be operated in

private schools" (Sec. Br. in Opp., p. 2a). The stated premise is that "private schools are not eligible for Title I services" *(id.)*. The policy guidance is further complicated by the proviso that "eligible private school children residing in an area served by a schoolwide program school must be offered equitable services" *(Id.)*. Then, in July of this year, the Secretary promulgated a regulation which may be to the same effect, but is not worded in the same way as his policy guidance. C.F.R. § 200.12(b).

Cross-petitioners admit that we were not previously aware of these quite recent and quite remarkable pronouncements. Their recent issuance is explained by the fact that, although schoolwide programs have been in the Title I statute since 1978, it is only in the current school year of 1996-1997 that such programs were, for practical purposes, made widely available by the clause in the statute allowing them in schools in which as little as 50% of the students are from low-income families.

The content of the Secretary's recent pronouncements provide another reason why there should be no reconsideration of *Aguilar* without a more complete record. We reserve comment on the distinction that the Secretary draws between schoolwide services that benefit 100% of the students attending a "private" or religious school and other Title I services that benefit the lesser, but still substantial percentage of such students that qualify for Title I services. Such comment would be in response to those sections of the reply briefs which are not in opposition to the question raised in the cross-petition, and cross-petitioners have accordingly avoided responding to those sections.

CONCLUSION

The cross-petition for a writ of certiorari should be granted.

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